

22-6724

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

In re: Cobb

On Appeal

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SUPREME COURT, U.S.

From The Eleventh Circuit Court of Appeals

and

The United States District Court For The Northern District of Alabama

Dist. Ct. Dkt. No. 7:09-cr-00486-LSC-GMB-1

Petition For A Writ of Habeas Corpus

Pro Se

Christopher D. Cobb #37691-051
Federal Satellite Low
2680 US Hwy 301 South
Jesup, GA 31599

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CHRISTOPHER COBB

v

UNITED STATES OF AMERICA

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Petition For A Writ of Habeas Corpus

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Question Presented

- 1) Whether *Hemphill v New York*, 595 US ___, 142 S.Ct. 681, 211 L Ed. 2d 534 (2022) should be declared retroactive to cases on collateral review.

Table of Contents

Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	3
Summary of the Argument	4
Reasons For Granting the Petition	5
I. <u>Hemphill</u> Should Be Declared Retroactive	5
A) <u>Hemphill</u> is Substantive	5
B) <u>Hemphill</u> 's Declaration Concerns "Bedrock" Constitutional Principles	5
C) <u>Hemphill</u> Shows That The "Watershed Rule" is <u>Not</u> "Moribund"	6
D) Historical Standard For Retroactive Caselaw	6
II. <u>Hemphill</u> Is Applicable To Cobb's Case	7
A) Government's Exhibits 11, 16, and 17 At Cobb's Trial Were Testimonial In Nature	7
B) Cobb Was Specifically Denied His Right of Confrontation	8
Conclusion	9
Certificate of Service	10

Table of Authorities

Caselaw	Page #
Adams v Illinois, 405 US 278 (1972)	6
Betts v Brady, 316 US 455 (1942)	6
Brown v Louisiana, 447 US 323, 328-30 (1980) (plurality)	6
Bullcoming v New Mexico, 546 US 647 (2011)	6, 7, 8
Butler v McKellar, 494 US 407, 415-16 (1990)	4, 7
Crawford v Washington, 541 US 36 (2004)	3, 6
Edwards v Vannoy, 141 S.Ct. 1547, 1555, 1557 (2021)	6
Gideon v Wainwright, 372 US 335 (1963)	4, 5, 6
Hankerson v North Carolina, 432 US 233, 243 (1977)	6
Hemphill v New York, 142 S.Ct. 681 (2022)	3, 4, 5, 6, 7, 8, 9
Hurtado v California, 110 US 516 (1884)	6
Johnson v New Jersey, 384 US 719 (1966)	6
Linkletter v Walker, 381 US 618, 629 (1965)	6
Mackey v United States, 401 US 667, 693 (1971)	7
Melendez-Diaz v Massachusetts, 557 US 305 (2009)	6
Moore v Illinois, 408 US 786, 800 (1972)	6
Palky v Connecticut, 302 US 455 (1942)	6
Peary v Linaugh, 492 US 302 (1989)	7
Powell v Alabama, 287 US 45 (1932)	6
Robinson v Neil, 409 US 505, 507, 509 (1973)	6
Saffle v Parks, 494 US 484, 495 (1990)	7
Stovall v Denno, 388 US 293 (1967)	6
Teague v Lane, 489 US 288, 307, 311 (1989)	4, 6, 7
United States v United States Coin & Currency, 401 US 715, 724 (1971)	6
Whorton v Bockting, 549 US 406, 416 (2007)	7
Williams v United States, 401 US 646, 653 (1971) (plurality)	4, 6

Statutes

18 USC § 2258A(a)-(d)	8
18 USC § 2258A(c)	7
28 USC § 2255	3, 9

Table of Authorities (Cont'd)

U.S. Constitution	Page #
Article I, Section 9	1
Article III, Section 2	1
Sixth Amendment	2, 4, 5, 7, 8, 9
Citations to the Record	
Doc. 59, at 54-55	7
Doc. 60, at 34-51	8

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Statement of Jurisdiction

The Supreme Court has Original Jurisdiction over Habeas Corpus pursuant to Article III, § 2 and Article I, § 9.

Constitutional Provisions Involved

This Petition is presented under the Supreme Court's Original Jurisdiction pursuant to Article III, Section 2 and the Command of the Constitution that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public Safety may require it" Article I, Section 9.

The issue presented concerns the Confrontation Clause of the Sixth Amendment to the Constitution of the United States.

Statement of the Case

In January of 2011, Cobb was found guilty on Counts 1 and 3, and not guilty on Count 2 of a three count Superceding Indictment in a jury trial. During the course of pre-trial, and again during trial, Cobb's attorney objected to the inclusion of Exhibits 11 and 16 and during the course of the trial, to the surprise introduction of Exhibit 17. All of which consisted of testimonial presentations by forensic examiners, without the person who presented the evidence being cross-examined on said evidence. When trial counsel objected to the exhibits listed, the trial court found the evidence to "be reliable" and therefore admissible without the opportunity to test said evidence, this Court's decision in Crawford notwithstanding. Cobb was then forced to testify in his own defense.

Cobb then issued a counseled direct appeal, citing the inadmissibility of Exhibits 11, 11 and 16, but not specifically #17. His convictions were affirmed. Cobb then submitted a 28 U.S.C. § 2255, which did not raise the exact claim that succeeded in Hemphill, but was similar in scope. His petition was denied, and the Eleventh Circuit declined to allow a Certificate of Appealability. He did not file for Certiorari on either of these two appeals due to transfer after his loss of his Direct appeal leaving him out of communication with his attorney and due to his lack of knowledge of his right to do so on the §2255.

Subsequently, Cobb learned of the absence of his Prosecuting AUSA's Oath of Office, and attempted to file a Rule 60 Motion to reopen the proceedings, which likewise failed. He then attempted to obtain Grand Jury transcripts pertaining to the presence of the AUSA in question during the proceedings, and was again denied. He appealed, to the Eleventh Circuit, and finally to the Supreme Court and was turned down by both entities.

Summary of the Argument

Cobb presents now that *Hemphill v New York*, 142 S.Ct. 681 (2022) should be declared retroactive, as it is a "substantive" ~~ruling~~ concerning the Sixth Amendment, which "dictates what material is relevant and admissible in a case" (*Hemphill*, 142 S.Ct. at 691 (Sotomayor, J.) and constitutes "[o]ne of the bedrock constitutional protections" (at 690) the purpose of which is to "bar judges from substituting their own determinations of reliability for the method the Constitution guarantees." That "[t]he Confrontation clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court" and that such an occurrence "violate[s] that fundamental guarantee." (at 694).

With the issue of forensic evidence not being tested for reliability in Cobb's case, and the fact that numerous "forensic processes" have been declared invalid via such a method, Cobb asserts that the admission of Exhibits 11, 16 and 17 violated not just procedural standards under the Sixth Amendment's Confrontation Clause, but that they violated substantive standards under the Confrontation clause as well, as announced in Hemphill.

This Court has stated that where a new rule was intended to overcome an impairment of the truth-finding function of a criminal trial, retroactivity is applicable on collateral habeas review, so long as the rule advances the likelihood of a more accurate trial - see e.g. *Williams v United States*, 401 US 646, 653 (1971) (Plurality); *Teague v Lane*, 489 US 288, 307 (1989); and *Butler v McKellar*, 494 US 407, 415-16 (1990).

This substitution of reliability as invalidated in Hemphill, and as applied in Cobb's case should, therefore, be seen as retroactive to cases on collateral review.

Alternatively, this issue should be seen as fitting the rare case of being a "watershed" ruling, as Hemphill not only was aimed at improving the accuracy of a trial, but also alter the understanding of the bedrock procedural elements essential to the fairness of a proceeding. Previously, the Supreme Court has issued only one such ruling - not coincidentally, Cobb avers, one that also dealt with Sixth Amendment protections - in *Gideon v Wainwright*, 372 US 335 (1963). In Gideon, the Court announced that the right to counsel as being a "bedrock" right, even with the limitations that still exist after Gideon (no right to counsel in misdemeanor cases, or civil cases). Likewise, the Right to Confrontation has corollaries, such as those to protect minors or admissibility of testimonial statements from certain "unavailable" witnesses. Accordingly, this Court should find that Hemphill is retroactive and that Hemphill applies in the instant case.

Reasons For Granting the Petition

I. Hemphill Should Be Declared Retroactive

A) Hemphill Is Substantive

The issue resolved in Hemphill was that a Testimonial statement from the plea allocution of Hemphill's co-defendant was produced at Hemphill's trial in order to undermine Hemphill's "Some Other Guy Did It" defense. The presiding Trial judge in Hemphill declared that the testimonial statement was "reliable" and "invited" by Hemphill's proffered defense. This was done under exceptions to the Confrontation requirement which were spelled out in New York's Reid Rule. The Supreme Court, specifically, found this to be a "substantive principle of evidence that dictates what material is relevant and admissible in a case" - Hemphill, 534 US at 538. Allowing such an admission in Hemphill's case would lead to practices that the Confrontation Clause was put in place specifically to prevent by giving the prosecution an easy way to avoid having to put a witness on the stand. The National Association of Defense Lawyers, in support of Hemphill's Petition asserted that upholding this type of introduction of testimonial evidence without the defendant's ability to confront the presenter infringes on the defendant's fundamental Constitutional rights. They contended that allowing such forces defendants to choose between the Constitutional Rights of confrontation, to present evidence/testimony, or to take the stand. The fruit of this type of confrontation violation, then, poisons the entire trial process which should be seen as a substantive issue - as Hemphill declares outright.

B) Hemphill's Declaration Concerns "Bedrock" Constitutional Principles

Again, the decision in Hemphill declares outright that the Confrontation Clause is "[o]ne of the bedrock constitutional protections" Id., 142 S.Ct. at 690. Just as Gideon v Wainwright, 372 US 335 (1963) declared that the right to counsel is "fundamental" and "without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible" Gideon, 372 US at 345 (Black, J; emphasis added). As in the case of the lack of trial counsel, the lack of an ability to cross-examine a witness (or in this case testimonial statements) is a violation of a "fundamental principle" or, as stated in Hemphill, a "bedrock constitutional protection[]" on par with this Court's holding in Gideon. As stated above, and by the National Association of Defense Lawyers, such a violation infects every part of the trial process.

As such, this Court should declare Hemphill to be retroactive on collateral review.

C) Hemphill Shows That The "Watershed Rule" Is Not "Moribund"

In the case of Edwards v Vannoy, 141 S.Ct. 1547, 1555, 1557 (2021), this Court noted that the Teague court itself had stated that it was "unlikely" that new watershed rules would emerge and, "in the 32 years since Teague... the Court has never found that any new procedural rule actually satisfies that purported exception." (at 1555); see also Id., at 1557: "[t]he Court has identified only one pre-Teague exception: the right to counsel recognized in Gideon v Wainwright, 372 US 335, 344-45 (1963)"; and concluding "[n]ew procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund." Id. at 1560. The definition of "moribund" provided by Webster is that of "being in a dying state." While finding of a watershed rule may be a rare occurrence (having only been acknowledged once), that does not mean that it is dead, or that it is dying. This Court should see that Hemphill proves such - as it is a decision that is hybrid of substantive and procedural importances. Yes, like the right to an attorney, it is a procedural issue, but also like the right to an attorney it is a substantive issue - as it infects all aspects of a trial. Thus, should this Court declare Hemphill to be retroactive, then it should also be considered to be a "watershed" rule. Just as with the right to an attorney, the previous Supreme Court cases concerning the same issue had been declared to be non-binding via retroactivity, i.e. Crawford v Washington, 541 US 36 (2004); Melendez-Diaz v Massachusetts, 557 US 305 (2009); and Bullcoming v New Mexico, 546 US 647 (2011) compared to: Hurtado v California, 110 US 516 (1884); Palko v Connecticut, 302 US 319 (1937); and Betts v Brady, 316 US 455 (1942) (all as cited in Gideon v Wainwright. Also see Powell v Alabama, 287 US 45 (1932).

The similarities between the holding in Gideon and the holding in Hemphill should not be overlooked by this Court.

D) Historical Standard For Retroactive Caselaw

"[T]he Constitution neither prohibits nor requires retrospective effect." - Linkletter v Walker, 381 US 618, 629 (1965). The Supreme Court has, at various times, covered degrees of retroactivity for various cases - Johnson v New Jersey, 384 US 719 (1966); Stovall v Denno, 388 US 293 (1967); Adams v Illinios, 405 US 278 (1972); and Robinson v Neil, 409 US 505, 507 (1973); in certain cases where a new rule was intended to overcome an impairment of the truth-finding function of a criminal trial (1) or cases where the Court found that a constitutional doctrine barred the conviction or punishment of someone (2), the Court granted its decisions full retroactivity, even for habeas claimants.

(1) Williams v United States, 401 US 646, 653 (1971) (plurality); Brown v Louisiana, 447 US 323, 328-30 (1980) (plurality); Hankerson v North Carolina, 432 US 233, 243 (1977)

(2) United States v United States Coin & Currency, 401 US 715, 724 (1971); Moore v Illinios, 408 US 786, 800 (1972); Robinson v Neil, 409 US 505, 509 (1973)

Cobb asserts now that *Hemphill v New York*, 142 S.Ct. 681 (2022) would fall under Note (1) of this issue were it decided then.

But in *Peary v Lynaugh*, 492 US 302 (1989), the Supreme Court held that a new rule may apply retroactively in a collateral proceeding "only if (1) the rule is substantive or (2) the rule is a watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." - *Whorton v Bockting*, 549 US 406, 416 (2007) (quoting *Saffle v Parks*, 494 US 484, 495 (1990))

As *Teague v Lane*, 489 US 280, 311 (1989) explained: the Supreme Court will apply a new rule in a collateral proceeding only if it places certain kinds of conduct "beyond the power of the criminal law-making authority to prescribe" or constitutes a "new procedure [] without which the likelihood of an accurate conviction is seriously diminished"

The second exception is what is relevant here, as Hemphill requires "[a] procedure[] that...[is] implicit in the concept of ordered liberty" *Id*, quoting *Mackey v United States*, 401 US 667, 693 (1971) (Harlan, J. concurring).

Here, Hemphill requires the right of confrontation to be observed in the use of vetting testimonial evidence; the decision even explicitly states that it is "fundamental," "substantive," "[o]ne of the bedrock constitutional protections," speaks to "the reliability and veracity of the evidence against a criminal defendant," (Hemphill, 142 S.Ct. at 690-694) and therefore advances the likelihood of a more accurate trial (Williams, 401 US at 653; Teague, 489 US at 307; and Butler, 494 US at 415-16).

Since Teague, the Supreme Court has consistently held that new substantive constitutional rules apply retroactively. Accordingly, Hemphill is due to be declared retroactively applicable on collateral review.

II. Hemphill Is Applicable To Cobb's Case

A) Government Exhibits 11, 16, and 17 At Cobb's Trial Were Testimonial In Nature

Government's Exhibit 11 was a compact disk that contained contraband files which were generated from the NCMEC database in accordance with 18 U.S.C. § 2258A(c) - a report generated by an individual with "expertise" in the area of "computer forensics" which was not present at trial in any capacity. This meets the definition of "testimonial evidence" as outlined in *Bullcoming v New Mexico*, 564 US 647 (2011). Whoever generated this disc was required to be present for cross-examination under the Confrontation Clause, but the prosecution instead placed the duty of explaining this forensic report on the shoulders of Investigator Wilkins - who could not legally testify on the accuracy or production process of the disc, nor could he do so in fact.

Government's Exhibits 16 and 17 were two emails which were generated by the prosecution's Expert Witness, Mr Wesson. These consisted of two emails pulled by Mr Wesson

from Government's Exhibit two - the Desktop tower, which the prosecution used to link the defendant to the desktop. Again, this constitutes presentation of Testimonial Evidence as outlined in Bullcoming; as it came from a "forensic report" that was generated by an "expert" in the relevant field.

As such, these Exhibits all fall under Hemphill's requirement of testimonial evidence which leaves only the need to show that Cobb was unable to "cross examine" the individuals who generated these items used against him.

B) Cobb Was Specifically Denied His Right of Confrontation

1) As previously stated, Government's Exhibit 11 was a compact disc report generated by a NCMEC technician who was never present at trial, nor was this person even on the list of potential Government witnesses. This absence left Cobb unable to test the accuracy of the report's generation or production - see e.g. 18 U.S.C. § 2258A(a)-(d); and Doc. 60 at 34 - 51 (discussing the process used to generate Exhibits 7-14). If the Court will note, Exhibits 7, 8, 9 and 10 were all generated the same way, with all images and videos of contraband material coming from the NCMEC database, NOT the defendant's devices. Accordingly, there should have been a representative from NCMEC available to testify on the "accuracy" and "varacity" of each of these Exhibits. Defense counsel objected most strenuously to Exhibit 11, but all of these Exhibits fall under the same error of disallowing the defense the opportunity to Confront the witnesses against him.

2) Exhibits 16 and 17 were emails pulled by Investigator Wesson, the forensic expert witness presented at trial by the prosecution. These emails were the only evidence presented that could be seen as tying the defendant to these computers prior to Cobb's taking the stand. These Exhibits were both introduced on the last day of trial, having not been in the ~~Discovery~~. Defense counsel objected strongly against the inclusion of these as violative of both the letter and spirit of the Discovery process, as they constituted surprise evidence that the Defense had no opportunity to prepare for. These Exhibits were introduced the day that the prosecution rested its case, and was the first time that the Defense was notified of their existence. Although the Defense was able to ask questions about these two Exhibits, it was not given the chance to prepare for said cross. Thusly, there was no real "confrontation" concerning these Testimonial Statements, just as was declared a violation in Hemphill. Cobb had no more opportunity to confront Investigator Wesson than Hemphill had to confront his Co-defendant. In both cases, the witness against the accused was technically available, but not for the purpose of confrontation due to the extreme lateness of the presented Exhibits. In both instances, the "surprise" element should have resulted in exclusion of the evidence under Rules 402(b) and 403 - or would have in Hemphill were it federal. In both instances, a violation of the Discovery process led directly to a Confrontation Clause violation that prejudiced the defendant. In Cobb's

case, the prejudice caused him to have to take the stand in his own defense on the same day that the two offending Exhibits were first mentioned to the Defense. This violation of the Confrontation Clause, therefore, forced Cobb to relinquish his Fifth Amendment Right to remain silent; which in turn led to a 2 Point enhancement at sentencing due to the trial judge being "irreconcilable with the jury's verdict." (Doc 59, at 5). Again over the Defenses objection.

The Government's waiting until the final day of trial to present Exhibits 16 and 17 (when it had possession of these since seizure of the computers) was clearly in response to Cobb's proffered defense of showing that the Government had produced no evidence showing that Cobb had ever used either computer. This was done, therefore under a theory that Cobb "opened the door" to the Government's actions "to correct" Cobb's defense - just as was done in Hemphill. As though the Government - and the trial court - had New York's Reid Rule in mind at that time as all facts of the case are on point.

The Government failed to place these Exhibits in the Discovery, had them the whole time all proceedings were occurring, yet then used them in order to ambush Cobb during trial - forcing him to change course in the middle of his defense "on the fly" as it were. These are manipulative tactics, the Government left a hole in its case open for the defense to attack, then closed said hole in a patently "foul blow" that the trial court endorsed for all same reasons that were cited in Hemphill as being a violation of the Sixth Amendment.

For these reasons, this Court should find that Hemphill applies to Cobb's case, and Grant, Vacate, and Remand (GVR), declaring Hemphill to be retroactive to cases on collateral review and ordering the Eleventh Circuit to allow Cobb to file a Second or Successive 28 USC § 2255 on this issue.

CONCLUSION

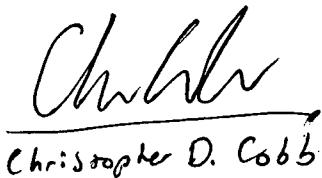
The Hemphill case is due to be declared retroactive under explicit statements made by the Supreme Court in the Hemphill decision that it is substantive in nature, and that a violation of the sort in Hemphill (and herein) implicates "bedrock principle[s]" of a "fundamental" nature that are secured by the Sixth Amendment's Confrontation Clause and directly affect all cases which are taken to trial in the United States. This includes Cobb's case, and accordingly, he requests a Writ of Habeas Corpus be issued by this Court Declaring Hemphill to be retroactive on collateral review, and for the Eleventh Circuit to allow Cobb to file a Second or Successive 28 USC § 2255 petition. I, Christopher David Cobb, hereby swear under penalty of perjury that the foregoing is both true and correct, to the best of my knowledge, and pray for the relief of this Court in the form of a GVR, or any relief this Court sees fit to provide.

Declaration of Compliance With Rule 20.1
and Rule 20.4 of the Rules of the Supreme Court

This Petition should be seen by this Court to show that it is in aid of its appellate jurisdiction through as a favorable result will resolve inconsistencies concerning the application of previous Supreme Court decisions among the lower courts as described in the body of this Petition; that exceptional circumstances warrant the exercise of This Court's discretionary powers as it concerns a matter of grave importance in Sixth Amendment and Fifth Amendment jurisprudence that was previously corrected in Hemphill v New York, 595 US _____. 142 S.Ct. 681, 211 L Ed. 2d 534 (2022); but not expressly declared retroactive - the retroactive application of Hemphill being the only question presented in this Petition; and since adequate relief cannot be obtained from any other court in this instant case due to the twin facts that Cobb has previously filed a 28 USC §2255 Petition on other grounds, and has been denied a Second or Successive §2255 Petition on solely on the ground that Hemphill has not been specifically declared retroactive by this Court - see In Re: Christopher David Cobb, No 22-13574-A, 2022 US App LEXIS 31139 (11th Cir Nov 9, 2022); and since McCarthan v Dir. Goodwill-Suncoast Inc., 851 F.3d 1076, 1081, 1099 (11th Cir. 2017) prevents the filing of a 28 USC § 2241 in the district court where Cobb is incarcerated, and since Cobb cannot obtain a transfer to a more favorable district where he could file for relief under §2241 due to Fed. R. App. P. 23's command to keep a prisoner with a pending §2241 Petition in place (Cobb has a §2241 Petition concerning the Unconstitutional denial of First Step Act Time Credits currently pending in the S.D. of Georgia - see Cobb v Warden, Civil Action No 2:23-cv-8 (S.D.Ga)); this Court, using this Vehicle, is Cobb's only avenue for relief on the instant issue.

The exceptional circumstances that warrant the exercise of this Court's discretionary powers are identical to those which warranted the exercise of those same powers when this Court granted both review and favorable disposition to Hemphill, that of the Guarantees presented in both the Sixth and Fifth Amendments to the U.S. Constitution, and the denial of selfsame guarantees in the instant case without cause, and with only an explanation that had already been rejected by this Court at the time it was offered by the Trial Judge: that the unconfronted evidence used against Cobb at trial was found by the Trial Judge to "be reliable".- see Crawford v Washington, 541 US 36 (2004).

Signed,



Christopher D. Cobb

Jan 30, 2023
Date